No. 48026-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

V.

MARTHA E. FROEHLICH, RESPONDENT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell Judge

No. 13-1-00445-3

BRIEF OF APPELLANT

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A. INTRODUCTION

This case evolves from an officer's decision to impound a car that had been involved in an accident. The impoundment led to an inventory search, which led to the discovery of contraband, which led to the filing of criminal charges. The trial court found the impoundment legally appropriate in every respect except for the requirement that the officer consider reasonable alternatives to impoundment. Because the trial court concluded that the officer did not pursue reasonable alternatives to impoundment, the trial court suppressed the evidence and dismissed the case.

Other questions remain unsettled in the case, such as whether, when conducting an inventory search pursuant to the impound, the officer had legal authority or justification to look into the driver's purse, which had been left on the front seat of the unattended car after the driver had been taken to hospital in an ambulance. But because the trial court suppressed the evidence and dismissed the case based upon its conclusion that the officer did not seek out alternatives to impoundment, the trial court did not reach or decide these other issues.

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Therefore, the only question under review is whether the trial court erred when it concluded that, although the inventory search was otherwise lawful as a legitimate caretaking function of the officer, it was nevertheless unlawful based on the court's finding that the officer did not fulfill his duty of seeking out alternatives to impoundment, and because neither RCW 46.55.113(2)(b) nor (2)(c) provided alternative justification for an impound on the facts of this case.

B. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in Finding of Fact Number 12, to the extent that the trial court found that Froehlich was the owner of the red car that she was driving;

Assignment of Error No. 2: The trial court erred in its Conclusion of Law No. 22;

Assignment of Error No. 3: The trial court erred in its Conclusion of Law No. 24;

Assignment of Error No. 4: The trial court erred in its Conclusion of Law No. 25;

Assignment of Error No. 5: The trial court erred in its Conclusion of Law No. 26;

Assignment of Error No. 6: The trial court erred in its Conclusion of Law No. 27; and,

Assignment of Error No. 7: The trial court erred in its Conclusion of Law No. 28.

Issues pertaining to assignments of error: *Did the trial court err by finding that the inventory search following impoundment of defendant's car was unlawful under the community caretaking exception because the officer did not pursue alternatives to an impound, or in the alternative, did the trial court err by finding that neither RCW 46.55.113(2)(b) nor (2)(c) statutorily authorized an impound in this case?*

C. FACTS AND STATEMENT OF THE CASE

On July 8, 2013, Trooper Adam Richardson of the Washington State Patrol was dispatched to the intersection of Johns Prairie Road and State Route 3 in Mason County to investigate an automobile collision that involved a pickup truck driven by a Washington State Fish and Wildlife

officer, SGT Jackson, and a red passenger car driven by a civilian, Martha Froehlich. RP 2-3, 5. When Trooper Richardson arrived, he saw that the pickup truck had heavy damage and that the front tire was missing. RP 3. The red car was positioned on a hillside and had front damage. RP 3.

The red car driven by Froehlich was inoperable and was positioned on the shoulder of the road, about a foot or two from the fog line, tipped up and tilting toward the road. RP 4, 8; Ex. 1-4. The windows and the sun visor were open, but the driver's door could not be opened. RP 4; Ex. 4. There were items of personal property, including a speaker box or speakers, amplifier, laptop computer, and a black purse located openly inside the car. RP 8, 15, 19; Ex. 5. The section of roadway where the red car was positioned has very limited visibility and is a main thoroughfare going into the town of Shelton. RP 7; Ex. 6.

When Trooper Richardson began his investigation, Froehlich was seated in the passenger seat of SGT Jackson's pickup truck. RP 3. Trooper Richardson asked Froehlich for her license and registration, but Froehlich was unable to provide registration for the red car. RP 10. Froehlich allowed Trooper Richardson to look in the car for the registration, but he was unable to find it. RP 10. He did, however, find a

title to the car, but the title was not in Froehlich's name. RP 10-11. Trooper Richardson asked Froehlich who the car belonged to, and her response was that it was not her car. RP 12-13. Froehlich was alone with the car. RP 13.

During his accident investigation, Trooper Richardson's contact with Froehlich was interrupted when a second trooper, Trooper Bates, arrived to administer some field sobriety tests to Froehlich. RP 11. However, the tests were not administered in the field, because Froehlich said she was injured and wanted to go to the hospital. RP 9. Medics were summoned, and they loaded Froehlich onto a gurney and took her to the hospital. RP 9; Ex. 7. Trooper Bates followed the ambulance to the hospital, where he later conducted sobriety tests and opined that Froehlich was not impaired. RP 11.

Because the accident involved a State Patrol vehicle (SGT Jackson's Washington Department of Fish and Wildlife vehicle), the accident had to be investigated by a collision technical specialist before the vehicles were moved. RP 14. A trooper specialist came to the scene and marked the vehicles, and then removal of the vehicles began. RP 14.

There was heavy damage to the red car. RP 19. Because of damage to the car and the position of the car on the hillside, it appeared to be neither safe nor possible to remove it without a tow truck. RP 19, 20. The car was located near a heavily traveled intersection with limited visibility, and it presented a danger to the public. RP 19, 22-23, 35. Trooper Richardson determined that there was no way to close the windows or otherwise secure the contents inside the car. RP 15-16.

There was no one present to take possession of the car. RP 19. Prior to being taken away in an ambulance, Froehlich had offered no alternatives to impoundment and did not indicate that there was anyone who could come to get the car. RP 19. Trooper Richardson followed standardized procedure and impounded the red car Froehlich had been driving. RP 14. When completing an inventory of the contents of the car during the impound, Trooper Richardson first looked into the black purse, because he reasoned that is where cash or other valuables are commonly stored and because, if he confirmed that the purse belonged to Froehlich, he was going to take it to her at the hospital rather than inventory its contents. RP 16, 31-32. When he did so, he immediately saw a clear bag that contained a white crystalline substance that he recognized as

methamphetamine. RP 16. At that time, he ceased the inventory and obtained a search warrant. RP 19-17, 21.

After execution of the search warrant and the discovery of more contraband and other evidence, the State charged Froehlich with a violation of RCW 69.50.401, unlawful possession of a controlled substance with intent to manufacture or deliver. CP 45-46. Froehlich moved to suppress the evidence, primarily alleging that there was no lawful basis for impoundment of the red car. CP 38-44. The trial court granted the defense motion, finding that there was no lawful basis for impoundment of the car because the officer did not pursue reasonable alternatives before impounding the car. CP 26-32. Specifically, the trial court found that the State had not proved that the impoundment was necessary because Trooper Richardson failed to ask Froehlich for instructions about removal of the car before she was taken away in an ambulance. CP 30 (Conclusion of Law 22). The trial court suppressed all evidence obtained from the inventory search and all evidence obtained from the search warrant. CP 5-11. The trial court then cited RAP 2.2(b)(2) and dismissed the case. CP 12.

D. ARGUMENT

Did the trial court err by finding that the inventory search following impoundment of defendant's car was unlawful under the community caretaking exception because the officer did not pursue alternatives to an impound, or in the alternative, did the trial court err by finding that neither RCW 46.55.113(2)(b) nor (2)(c) statutorily authorized an impound in this case?

a) Standard of Review

A trial court's ruling on a suppression motion is reviewed for whether substantial evidence supports challenged findings of the trial court and whether those findings support the trial court's conclusions of law. *State v. Barnes*, 158 Wn. App. 602, 609, 243 P.3d 165, 168-69 (2010), citing *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016, 41 P.3d 483 (2002).

b) The State contends that Finding of Fact 12 is erroneous because it implies Froehlich was the legal owner of the red car that she was driving.

The State does not dispute that Froehlich controlled and possessed the red car when she was involved in the accident described in this case, but the State does dispute whether Froehlich was the owner of the car. Froehlich was unable to produce registration for the car, and she told

Trooper Richardson that the car did not belong to her. RP 12-13. Although Trooper Richardson could not find the registration, he did find a title, and he confirmed that the car title was issued to someone other than Froehlich. RP 10-11.

Even if we assume that Froehlich had permission from the registered owner to drive the car, Froehlich was unable in this case to drive the car from the accident scene, both because the car was disabled and because Froehlich was taken by ambulance to a hospital. RP 9, 19, 20; Ex. 7. Here, presumably Trooper Richardson could have tried to find the legal owner of the car by taking the name from the title and beginning an investigation, but there was no reason to surmise that, even if he could identify and locate the owner, the owner would have been "available or locatable within a reasonable time[.]" *State v. Tyler*, 177 Wn.2d 690, 709, 302 P.3d 165 (2013). Still more, "using a telephone to attempt to contact an owner is problematic because the identity of the person on the other end of the call cannot be confirmed." *Id.*

Thus, legal ownership of the car is more than merely a technical matter, as is further demonstrated by the case of *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998). Peterson was the driver and sole

occupant, but was not the owner, of a car that a police officer pulled over for expired license tabs. *Id.* Peterson had a suspended license. *Id.* The arresting officer learned that the car was owned by a man named John Brady. *Id.* Nevertheless, without any attempt to locate the owner, the officer impounded the car. *Id.* On review, the Court of Appeals held that the impoundment and subsequent inventory search were valid because, it reasoned, "the owner was not present to authorize a licensed and insured driver to remove the vehicle or to authorize leaving the vehicle by the side of the road." *Id.* at 903.

A similar result was reached in the case of *State v. Ferguson*, 131 Wn. App. 694, 128 P.3d 1271 (2006). In *Ferguson*, the driver of a car stopped by police was not the registered owner of the car. *Id.* at 698. The car, which had Idaho plates, was seized in Washington, about 150 miles from the Idaho border. *Id.* Mr. Ferguson, who had no driver's license, had an outstanding warrant and was arrested. *Id.* His passenger was unable to produce a driver's license. *Id.* Thus, (as in the instant case) no one at the scene was available to drive the car away. *Id.* Unlike the instant case, the officer in Ferguson actually knew the identity of the registered owner of the car. *Id.* But, as in the instant case, the officer

made no effort to contact the registered owner before impounding the car. *Id.* When addressing the issue of the officer's failure to attempt to contact the registered owner, the *Ferguson* court validated the impoundment and subsequent inventory search, reasoning that "it was reasonable to impound the car and clear the intersection rather than seek an out-of-state resident to come and move the car." *Id.* at 702. The State contends that on the facts of the instant case, it was similarly reasonable for Trooper Richardson to immediately remove a threat to public safety by impounding the red car driven by Froehlich rather than to prolong the hazard in order to undergo an uncertain search for the legal owner.

c) *Conclusion of Law 22 is erroneous because it holds that even though Froehlich had been taken to the hospital in an ambulance and, therefore, was not present when an impound was ordered, the officer was required to ask her whether there was a reasonable alternative to impoundment.*

At its conclusion of law 22 the trial court wrote as follows:

> With respect to the second part of the "community caretaking function" criteria: There were several conversations between Ms. Froehlich and Trooper Richardson, but no conversations regarding her ability to arrange for the vehicle's removal. There is no evidence that Ms. Froehlich was unable to respond to such an inquiry. This distinguishes this case from *State v. Tyler* where the officer explored reasonable alternatives to an impound.

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> While the court in Tyler explored these actions in light of its analysis of reasonable alternatives, it only gets there because the officer in that matter did engage in a discussion of finding someone available to move the vehicle, as required in the second part of the community caretaking function. Here, it is clear that no such inquiry took place and the State has failed to meet its burden on the second part of the community caretaking function exception.

CP 30.

Here, the State contends that the trial court assigned undue significance to the fact that Trooper Richardson did not immediately speak with Froehlich about removal of the red car. When Trooper Richardson first arrived, Froehlich was seated in the pickup truck, and the record does not indicate any kind of known medical emergency. RP 3. It is reasonable that the Trooper would have many other concerns initially, such as determining what had occurred and what assets might be needed.

The accident scene was hectic and congested, and it posed a traffic hazard. Ex. 1-7; RP 22-23, 34-35. There was no foreseen need to place top priority at that time on speaking with Ms. Froehlich about arrangements for removal of the car she was driving, because she was seated in the pickup truck, and the trooper had to wait for a "collision

technical specialist" to arrive and mark off the scene before the vehicles could be removed. RP 14.

When Froehlich said she wanted to be examined by medics, an ambulance was summoned. RP 9. The State contends that it is unreasonable to demand that with all that was occurring at that time, Trooper Richardson should be burdened with the duty of prioritizing a conversation with Froehlich about what to do with the car, even while the car could not be removed at that time because the investigation was not completed. Then, the medics transported Froehlich to the hospital, and the State contends that it is reasonable that Trooper Richardson would have been occupied with other priorities at this hazardous accident scene and should not be expected to have the foresight to immediately interrupt the medics to determine what to do with the car that Froehlich was driving. RP 9, 10-13.

A car may be lawfully impounded under the community caretaking function if:

> (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft *and* (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle [.]

State v. Tyler, 177 Wn.2d 690, 698, 302 P.3d 165, 173-74 (2013). Here, there is no dispute that the red car Froehlich was driving was a threat to public safety and that the contents of the car were at risk of theft if left unsecured. But the trial court reasoned that Trooper Richardson was required to do more than he did to try and find an alternative to impoundment.

"[O]fficers must... consider reasonable alternatives to impoundment, and if they fail to do so, any subsequent search may be found unlawful." *State v. Tyler*, 177 Wn.2d 690, 708, 302 P.3d 165 (2013). Where there is no probable cause to seize an impounded vehicle and the impoundment is based on community caretaking rather than probable cause, then the impoundment is unlawful if a reasonable alternative to impoundment exists. *Id.* at 698. However, "[t]he police officer does not have to exhaust all possible alternatives, but must consider reasonable alternatives." *Id.* at 699 (citations omitted).

Here, Trooper Richardson testified that he considered alternatives to impoundment, but there were none. RP 19. The red car posed a threat to the public, and if the car was unattended, then the contents of the car were at risk of theft. Ex. 1-7; RP 4, 8, 15, 19, 22-23, 34-35. There was no

passenger or other person present who could take possession of the car or its contents. RP 19. The legal owner was not present. RP 12-13. Froehlich was not the registered or legal owner of the car (RP 12-13), and she had been transported to the hospital by ambulance (RP 9); thus, there was no indication that she would be capable of taking control of the car. In any event, the car was inoperable and safe removal required the assistance of a tow truck. RP 19, 20.

The State contends that on these facts, because Froehlich was not the legal or registered owner of the car, and because she had been transported to the hospital by ambulance and was not present at the accident scene when the investigation was completed, the Trooper should not be required to attempt to contact her to seek alternatives to an impoundment before having the car removed from the roadway for public safety and having the car's contents secured by impoundment.

d) The State contends that Conclusion of Law 24 is erroneous because it holds that before a tow is authorized under RCW 46.55113(2)(b) an officer must find the car to be unattended upon initial contact with the car even if, as in the instant case, the car later becomes unattended due to circumstances beyond the officer's control.

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At its conclusion of law number 24, the trial court ruled as follows:

> Subsection 2(b) [of RCW 46.55.113] requires that the police officer "find" the vehicle to be unattended. In the present situation, while the vehicle may have been inoperable, Mr. Froehlich was at the scene of the incident and the vehicle was therefore not unattended at the time Trooper Richardson found it. Therefore, section 2(b) does not apply.

CP 31.

RCW 46.55.113(2)(b) provides that "a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety... [w]henever a police officer finds a vehicle unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety[.]"

Here, the trial court reasons that when Trooper Richardson initially *found* the red car that Froehlich was driving, Froehlich was attending it. It was not until after Froehlich asked for medical attention and was then transported to the hospital that the car became unattended. The trial court reasons that at that point, Trooper Richardson had already *found* it.

The State takes a simplistic approach to the analysis and contends that, first, the statute does not specify that impoundment is limited to occasions when an officer *initially* finds a vehicle to be unattended.

Additionally, while the car here was attended when Trooper Richardson initially arrived at the accident scene, he did not find the car to be unattended until after Froehlich was taken away by ambulance. These circumstances were not created by the officer.

Thus, the State contends, RCW 46.55.113(2)(b) would authorize impoundment on these facts. But, as argued elsewhere in this brief, even if impoundment is statutorily authorized, the impoundment may nevertheless be unlawful if the impoundment was unreasonable because a reasonable alternative to impoundment was available. *State v. Tyler*, 177 Wn.2d 690, 698-99, 302 P.3d 165 (2013); *State v. Hill,* 68 Wn. App. 300, 305, 842 P.2d 996 (1993).

Therefore, resolution of this issue in the instant case, like resolution of whether the impoundment was authorized as a community caretaking function, is contingent upon whether the impoundment was reasonable. For the reasons argued throughout this brief, the State contends that the impoundment here was reasonable and necessary.

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e) *Conclusion of Law 25 is erroneous because it implies that Froehlich was the registered or legal owner of the red car she was driving and because it erroneously holds that the red car was not unattended when the trooper impounded the car, and because it holds that Froehlich was physically and mentally capable of making decisions to protect her property (the red car and its contents) even though she had been taken away in an ambulance.*

At its conclusion of law number 25, the trial court wrote as follows:

> RCW 46.55.113(2)(c) allows for an impoundment "Whenever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property."
>
> Subsection 2(c) has two parts: The first part requires the vehicle to be found unattended, again that is not the case here. The second requires that Ms. Froehlich was physically or mentally incapable of deciding upon steps to be taken to protect **her** vehicle. There is no evidence that this is the case. This does not require her to be able to *physically* protect the car, only that she is *unable to make a decision* on the steps to be taken to protect **her** vehicle. Again, without the inquiry or proof that she lacked this ability, the State has failed to meet its burden that this section of the statute applies.

CP 31 (italics in original, bold pring added by appellant).

The trial court's conclusion of law describes the red car that Froehlich was driving as "her vehicle." As a point of fact, however, the car did not belong to Froehlich. RP 10-13.

Now addressing the State's second point on this conclusion of law, RCW 46.55.113(2)(c) provides that:

> ... [A] police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety... [w]henever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property.

Id.

As in its Conclusion of Law 24, discussed above, the trial court held that Trooper Richardson did not *find* the red car unattended, because when he initially found it, it was attended, but did not become unattended until after Froehlich was taken away in an ambulance. For the same reasons as argued in regards to Conclusion of Law 24, above, the State contends that because the red car became unattended for reasons outside of Trooper Richardson's control – after Froehlich was transported to the hospital in an ambulance – Trooper Richardson then found the car to be unattended. And because Trooper Richardson found the car unattended at the scene of an accident, RCW 46.55.113(2)(c) authorized impoundment. The trial court found facts in the instant case, and presumably these findings were not by chance or surprise. In much the same way, after

Froehlich was transported to the hospital, Trooper Richardson found the red car to be unattended at the scene of an accident.

In addition to the statutory authorization discussed in the paragraph above, the statute also authorizes impoundment when "the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property." *Id.* The State contends that Froehlich was mentally or physically incapable of deciding on the steps to be taken to protect her property, first because the car was not her property, and secondly because she was either in the back of an ambulance or was in a hospital; therefore, she was physically and mentally unable to even be aware of what was occurring at the accident scene, must less make a decision or communicate it to anyone who could execute her decision.

Nevertheless, as argued above in regards to Conclusion of Law No. 24, even if statutorily authorized, an impound and accompanying inventory search may be unlawful if it is unreasonable under the circumstances or because there was a reasonable alternative to impoundment. *State v. Tyler*, 177 Wn.2d 690, 698-99, 302 P.3d 165

(2013); *State v. Hill,* 68 Wn. App. 300, 305, 842 P.2d 996 (1993)). Therefore, resolution of this issue, like resolution of the community caretaking issue, is dependent upon whether the impoundment in the instant case was reasonable. For the reasons argued throughout this brief, the State contends that the impoundment here was reasonable and necessary.

f) The State contends that Conclusion of Law 26 is erroneous for the same reasons as already discussed in regards to Conclusions of Law 24 and 25, above.

At its conclusion of law number 26, the trial court wrote as follows: "Based upon this analysis, the State has failed to meet its burden on the third alternative to support its argument that Trooper Richardson's impoundment was a lawful impoundment." CP 31. By the term "third alternative" the trial court is referring to the State's arguments in the trial court that, in addition to the impound in this case being authorized as a part of the officer's community caretaking function, in the alternative the impound was also valid under either RCW 46.55.113(2)(b) or under (2)(c), or both. For the reasons stated separately in the State's analysis of

conclusions of law number 24 and 25, above, the State assigns error here, also.

g) *The State contends that Conclusion of Law 27 is erroneous because the impoundment in the instant case was reasonable and necessary to protect public safety and to protect the contents of the car from theft.*

At its conclusion of law number 27, the trial court wrote as follows:

> Without meeting its burden to show that the impoundment was a lawful impoundment, the [S]tate is unable to justify the search of Ms. Froehlich's vehicle as an inventory search. This renders the warrantless search of Ms. Froehlich's vehicle in violation of Ms. Froehlich's state and federal constitutional rights against illegal search and seizure.

CP 31.

"Even when authorized by statute, 'impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties.'" *State v. Tyler*, 177 Wn.2d 690, 698-99, 302 P.3d 165 (2013) (quoting *State v. Hill,* 68 Wn. App. 300, 305, 842 P.2d 996 (1993)). Thus, the State does not dispute that an unlawful impoundment would properly lead to suppression of evidence obtained from an inventory search that flowed from the unlawful impoundment. But for the reasons argued

throughout the State's brief, the State disputes the trial court's finding that the impoundment in the instant case was an unlawful impoundment.

h) The State contends that Conclusion of Law 28 is erroneous because the State is asking that the trial court's order suppressing evidence be reversed on appeal, and if the State's appeal is granted then the issues identified in Conclusion of Law 28 should be decided by the trial court on remand.

At its conclusion of law number 28, the trial court wrote as follows:

> As a result, the court need not consider the remaining arguments regarding reasonable alternatives to impoundment; whether the search was a pretext to search for contraband; or whether the unzipping of the purse was an appropriate and necessary step for the purpose of inventorying the vehicle.

CP 32.

Because the State argues that the trial court erred by finding that the impoundment in this case was unlawful, the State also takes issue with Conclusion of Law No. 28 because if the State prevails on this appeal, then the State contends that this case should be remanded for resolution of the remaining issues.

D. CONCLUSION

Froehlich was not the owner of the red car that she was driving when she was involved in an accident that resulted in the car becoming disabled in a position that posed a threat to public safety. The car contained several items of personal property that were at risk of theft if the car was unattended. Medics took Froehlich away from the scene by ambulance after she asked that they transport her to the hospital. Neither the legal nor registered owner nor any other person associated with the car was present at the scene after Froehlich went to the hospital by ambulance.

Because the car posed a threat to public safety, and because the contents were at risk of theft, Trooper Richardson followed State Patrol procedure and began an impoundment. The State contends that impoundment was reasonable in these circumstances and that, therefore, the trial court erred when it found that the impoundment was otherwise lawful but that it was made unlawful because Trooper Richardson failed to consider reasonable alternatives to impoundment when he did not directly

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ask Froehlich whether she wanted to make arrangements for removal of the red car.

DATED: January 19, 2016.

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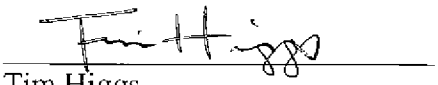

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